BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2021-143-E AND 2021-144-E

IN RE:	Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program Application of Duke Energy Carolinas, LLC forApproval of Smart $aver Solar as Energy Efficiency Program	**SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S ANSWER TO PETITIONS FOR RECONSIDERATION, REHEARING, AND/OR CLARIFICATION**

Pursuant to the rules and regulations of the Public Service Commission of South Carolina ("Commission") and other applicable law, the South Carolina Office of Regulatory Staff ("ORS") herein answers the 1) Petition for Reconsideration and/or Rehearing of Order No. 2022-239 ("Duke Petition") filed by Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively, "Duke" or the "Companies") on April 14, 2022, and 2) the Petition for Clarification and Statement in Support of Duke's Petition for Reconsideration and/or Rehearing of Order No. 2022-239 ("SEIA Petition") filed by the Solar Energy Industries Association ("SEIA") in the above-captioned matters. In support thereof, ORS would respectfully show as follows:

BACKGROUND

On April 14, 2022, Duke and SEIA filed petitions requesting that the Commission reconsider, rehear, or clarify its decision in Order No. 2022-239 ("Order"), which denied applications filed by DEP and DEC seeking approval of their proposed Smart $aver Solar programs ("Programs"). Duke requested that these Programs be included in their suites of energy efficiency ("EE") and demand-side management ("DSM") programs. Through these Programs,

Duke sought to provide residential customer generators who apply to install rooftop solar and receive service under Rate RE within the Solar Choice Metering Program on or after January 1, 2022, with a one-time incentive payment ("Incentive") in an average amount of $3,500 per participating customer. To be eligible for the Programs, customers also must become Solar Choice Metering customers on or after January 1, 2022, and enroll in the Winter Bring Your Own Thermostat ("BYOT") Program for 25 years. If approved as EE/DSM programs, the Companies would be eligible to recover not only the costs to implement the Programs through their annual EE/DSM rider proceedings, including recovery of net lost revenues associated with participating Net Energy Metering ("NEM") customer generation, but also a portfolio performance incentive, the costs of which would be borne by all ratepayers.

Following a thorough and thoughtful weighing of the testimony and evidence presented at the merits hearing in this matter, the Commission determined the record did not support a finding that the Programs should be approved. Specifically, the Commission found that Duke "neither quantified how much [the] increased benefits [of the Programs] might be, nor demonstrated that the proposed Programs are a cost-effective way to obtain any increased benefits." Order p. 35. In support of this conclusion, the Commission noted Duke evaluated the Programs using an assumed free-ridership percentage of 10%, but failed to present any specific evidence to support this assumption. By declining to approve the Programs, the Commission also rejected Duke's plea that it could remedy any inaccuracies in its analysis through an annual rider true-up process. The Commission also properly recognized that S.C. Code Ann. § 58-37-20, the statute pursuant to which Duke asked the Commission to approve the Programs, "expressly states the Commission has the discretionary authority to approve the proposed program." Order p.37. For these and the other well-articulated reasons set forth in the Order, the Commission properly rejected the

Programs finding that "Duke did not provide the Commission with sufficient evidence to support its assertions the [Programs] will be cost-effective." Order p. 35.

Presumably because the Commission correctly based its Order upon a weighing of the evidence and because the Order does not contain any legal error that the Companies could identify, Duke focuses its criticism on the simple fact that the Commission did not accept the Companies' one-sided and unsupported version of the facts. Duke further grumbles because the Commission declined to approve implementation of an unproven and first-of-its-kind program that would expose the Companies' customers to unnecessary additional expense with few if any benefits. Tr. p. 463.13, ll. 17-20. Finally, Duke improperly attempts to interject new facts and issues not presented or addressed in the merits proceedings. Using these objectionable facts, Duke suggests that the Commission should ignore the numerous errors underlying the Companies' assumptions and allow its shareholders the opportunity to earn additional returns at the expense of ratepayers on the basis that those errors *might* be remedied at some point in the future.

For its part, SEIA does not quarrel with the Commission's rejection of the Programs, which decision is "rooted in applying the traditional cost-effectiveness evaluation of programs." SEIA Pet., p. 2. Rather, it suggests the Commission should clarify that solar photovoltaic ("PV") generating facilities are eligible technologies under S.C. Code Ann. § 58-37-20, even though Duke did not satisfy its burden to prove by a preponderance of the evidence that the Programs are reasonable cost-effective, and should be implemented. However, it is clear the Commission found that, because the Programs are not cost-effective, they should not be approved *even assuming, but without concluding*, they are eligible technologies. Because this issue was dispositive, it was and is unnecessary for the Commission to rule on any other disputed issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

SEIA's unfounded argument that the Commission's decision in this matter will "significantly disrupt the solar market in South Carolina" also is unpersuasive and inappropriate for the Commission to consider in evaluating its decision in Order No. 2022-239. Although SEIA appears to now have misgivings about entering into an agreement with Duke in connection with the Solar Choice Metering program because they purportedly assumed the Programs at issue in this proceeding would be approved, this amounts to nothing more than buyer's remorse and not legal error. To the contrary, the Commission does not and should not rule upon the merits of a program and expose customers to unnecessary risk and expense simply to satisfy the particular interests of privately held companies.

In short, the Order is amply supported by law and the record of evidence, is in the public interest and in the interest of Duke's customers, and reflects a proper "weighing of the evidence and the drawing of the ultimate conclusion therefrom," which is "peculiarly within the Commission's province." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 597-98, 244 S.E.2d 278, 282 (1978). Because Duke and SEIA fail to identify any legitimate basis for granting reconsideration, rehearing, or clarification of Order No. 2022-239, the Commission should deny the relief requested in the Petitions and affirm its prior findings and conclusions that Duke did not meet its burden to show the Programs were cost effective.

STANDARD OF REVIEW

"The purposes of a petition for rehearing [or reconsideration] is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing [or reconsideration] is not just to have the case tried … a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933) (*cited with authority in* Order No. 2019-454, pp.11-12). Further, "[t]he purpose of a Petition for Rehearing is

not intended as a procedure for rearguing ... [a] case merely because the non-prevailing parties disagree with the original decision." *In re BellSouth BSE, Inc.*, Docket No. 97-361-C, Order No. 98-66 at 1-2. Rather, petitions for rehearing or reconsideration are to allow the Commission to identify and correct specific errors and omissions in its orders.

Nor can a party raise issues in a motion to reconsider that could have been presented prior to the decision on the merits or that are raised for the first time in a petition for rehearing. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E. 2d 481, 482 (Ct. App. 1990); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995); *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996).

Instead, "the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). *See also Miller by Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 325 (1994) (stating that the 'substantial evidence' test under the South Carolina Administrative Procedures Act ("APA") is not a mere scintilla of evidence nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.) (internal citations omitted). A petitioner's burden to show the case was wrongly decided also is a high one. Commission orders are presumptively correct on appeal and South Carolina courts of review "shall not substitute [their] judgment for that of the [Commission] as to weight of evidence on questions of fact." *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.3d 695, 696 (1984). *See*

also Ross v. Am. Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728 (730) (1989) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to ... Commission.") (reviewing decision of the S.C. Workers Compensation Commission under the APA).

ARGUMENT

A. Duke's Petition

Duke's argument as to why the Commission should reconsider Order No. 2022-379 can be summed up as this: the Commission did not acquiesce to the Companies' view of the evidence. Other than their own *ipse dixit* and restating their positions, the Companies offer no support for their suggestion that the Commission failed to properly consider their positions in denying the Programs. *Holcombe v. Dan River Mills/Woodside Div.*, 286 S.C. 223, 224, 333 S.E.2d 338, 339 (Ct. App. 1985) ("Where there was a conflict in the evidence, the findings of fact of the commission as triers of the fact were conclusive."). Instead, Duke attempts to supplant the Commission's view of the evidence with its own, and Duke's arguments that the Commission's view of the evidence is flawed are merely improper and erroneous attempts to relitigate the dispositive issues in this case. Contrary to Duke's assertions, the Order is comprehensive, is based on a thorough review and analysis of dispositive facts and evidence and does not contain errors of law or facts that were misconstrued. The Commission clearly laid out and considered the evidence presented by the parties and detailed its analyses in reaching the conclusion that Duke failed to meet its burden to demonstrate the Programs were cost effective.

In an effort to evade these substantive problems with which it is confronted, Duke also improperly advances new arguments and attempts to inject new evidence that was not previously presented and is not reflected in the record of these proceedings. *See Kiawah Prop. Owners*, 359

S.C. at 113, 597 S.E.2d at 149 (noting that an issue is not preserved if broached for the first time in a petition for reconsideration); *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482; *Patterson*, 318 S.C. at 185, 456 S.E.2d at 437 (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); *McGee*, 321 S.C. at 347, 468 S.E.2d at637 (a party may not raise an issue for the first time in a motion for a new trial).

With those principles in mind, ORS now turns to the merits of Duke's Petition in the order presented by the Companies.

1. Free-ridership.

Much of Duke's contention that the Order is flawed rests upon its misguided belief that the Commission erred by concluding the evidence offered by Duke was lacking and that the Companies did not provide the Commission with sufficient evidence to support its assertion the Programs will be cost effective. Specifically, Duke suggests that the Commission "err[ed] by ignoring evidence in the record supporting the Companies' free-ridership, and by instead adopting Witness Horii's fundamentally flawed analysis." Duke Pet. p. 7.

In this regard, Duke seems to believe that the presentation of a mere scintilla of evidence supporting its claims is sufficient in order to meet its burden of proof that the Programs are cost-effective and should be implemented. The law makes clear that this is not so. Instead, once Duke made a *prima facie* case that the Programs were cost-effective, which ORS denies, the burden of production shifted to ORS to present evidence contesting the Companies' assertion and demonstrating that the Companies' request should be denied. *Daisy Outdoor Adver. Co., Inc. v. S.C. Dep't of Transp.*, 352 S.C. 113, 118, 572 S.E.2d 462, 465 (Ct. App. 2002) ("Once a party establishes a prima facie case, the burden of proof shifts to the opposing party.").

Whatever burden Duke may have satisfied in its case in chief was overcome by the evidence presented by ORS that the Companies' free-ridership percentage, which reflects those participants who would have installed Solar PV even if the incentive proposed in the Programs did not exist, was unsupported by the record. In this regard, the Commission explicitly found that Duke offered no specific evidence to support its speculative 10% free-ridership calculation and that the evidence presented by ORS Witness Horii reasonably supports a finding that the percentage should be much higher at 79%. Using this corrected and more appropriate number, the Commission therefore agreed with ORS that Duke's proposed Programs pass neither the Utility Cost Test ("UCT") nor the Total Resource Cost ("TRC") test. Order p. 36. In reaching this conclusion, the Order clearly demonstrates the Commission carefully weighed the evidence of record and reached a conclusion that is fully supported by substantial evidence.

Even so, Duke argues the Commission should have acquiesced to its use of an unsupported 10% free-ridership estimate, which Duke professed to be not only appropriate but also likely exceedingly high. Duke further claims, without citing any supporting evidence, that absent the Programs customers would not invest in rooftop solar PV and participate in the winter BYOT program and that this "fact" alone supports a 0% free-ridership estimate. On this basis, Duke insists that it met its burden of proof even though it acknowledges it was required to convince the trier of fact that its proposed facts were more probable than its nonexistence. *See* Duke Pet. p.7 *citing U.S. Manigan*, 592 F.3d 621, 631 (4th Cir. 2010) *quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) ("*Concrete Pipe*"). What Duke ignores, however, is that "before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently

probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe*, 508 U.S. at 622. And in that respect, Duke failed.

For example, Duke first argues its 10% free ridership estimate, which is not based on any estimates or data but seemingly is an arbitrary assumption made to make the Programs appear cost-effective, Tr. pp. 459.23, 463.27 is reasonable based upon the Companies' experience in 2020 when 0.23% of Duke's residential customers installed rooftop solar. While Duke paints a rosy picture of its one-sided view of the evidence, Duke ignores that it put forth no evidence to demonstrate how many BYOT customers have solar panels or how that enrollment compares to non-solar participation.

By comparison, ORS Witness Horii stated that the Programs fail the UCT benefit-to-cost test based on Duke Energy's own data showing that approximately 79% of participants would be free riders. Tr. p. 459.22, ll. 1-13; p. 459.24, ll. 7-16 (noting that Witness Horii derived his 79% free-ridership calculation "using solar PV adoption forecasts provided by the Companies"); p. 459.25-.28 (detailing his calculations using information provided by Duke). After correcting Duke's free-ridership assumption from 10% to 79%, Witness Horii opined that the fact only 21% of customers would participate in the Programs solely because of the incentives leads the Programs to fail the UCT. Tr. 458, 463. Furthermore, ORS Witness Horii took exception with the Companies' claims noting that 2020 was heavily influenced by COVID-19 and that Duke's proposed perspective is not the correct way to evaluate future market uptake or customer adoption propensity. Tr. 463.21, ll. 6-11. He also pointed out that, based on the information provided by Duke in discovery, over 10,800 residential adoptions were anticipated in 2021, reflecting that over 2% of DEC and DEP customers will adopt solar during that period. Tr. p. 463.21 at fn.3. This

represents a *ten-fold* increase over the numbers Duke relied upon in its projections, thus conclusively demonstrating the fallacy of the Companies' position.[1]

Duke further laments that the Commission found the evidence offered by the Companies was "lacking" asserting that no utility can show free-ridership prior to implementing a program. Duke Pet. p. 10. They further feign incredulity that anyone could oppose a proposed EE/DSM program, no matter how accurate or faulty the assumptions may be, because "customers are abundantly protected from inexact assumptions through the [evaluation, measurement, and verification] EM&V and true-up process." What the Companies gloss over is that their estimates and forecasts must be based on reasonable and supportable assumptions that are reflected in the record, and their failure to present reliable and probative evidence supporting their proposals should not warrant additional cost and expense placed on its ratepayers.[2] *See* Tr. p. 337, ll. 20-23 ("You want to take a chance with ratepayers' money from this point, down the road, and then fix it later?"); p. 557, ll. 5-14 (noting that a true up could drag out at least a year and maybe three before the Programs could be evaluated for a true up); p. 341, ll. 2-4 ("We don't think you should gamble with customers' money to prove it right or wrong."); p. 441 ll. 13-21 (noting that Duke offered no details on how a true-up would work).

[1] Even so, Duke's own Petition appears to call into question the reasonableness of the Companies' 10% free-ridership estimate. *See* Duke Pet. pp. 10-11 (noting that "the average free-ridership across the EE/DSM measures offered by DEC and DEP equals 18%"). *See also* Tr. p. 596, ll 2-9 ("[E]very single measure that's offered by [DEC and DEP] – the average, across every single measure, is 18 percent free-ridership" and "there was one measure that had high free-ridership" which was 62 percent.").

[2] In support of its position, Duke makes the fanciful claim that ORS Witness Horii suggested Duke should not use forecasted adoptions to project free-ridership. *See* Duke Pet., p. 9, fn. 9. What Duke conveniently ignores, however, is that ORS Witness Horii made clear that this claim by Duke "confus[ed] the two issues." Tr. p. 532, l. 7 – p. 534, l. 6. In reality, ORS Witness Horii explained that Duke used a completely different way to develop its adoption forecast which used a payback period analysis. By comparison, ORS Witness Horii suggested that Duke should have looked at both payback and the state of the solar market in coming up with its adoption forecast. *Id.* at p. 534, ll. 1-6 ("I don't say use adoption forecasts. I'm just saying that what Duke has implied in the rebuttal testimony of Witness Duff is an incorrect way to use an adoption forecast from one year to apply future adoptions in other years.").

Not dissuaded by the lack of evidence supporting its positions, Duke next improperly attempts to inject new issues that were not at issue in the proceedings but nevertheless are irrelevant to the Commission's rejection of its claims. Duke claims Witness Horii "conflates free-ridership with 'spillover'" and suggests that "spillover would actually **increase** the Program's UCT score and increase savings for all customers." Duke Pet. pp. 12-13 (emphasis in original). Putting aside that Duke engages in a tortured interpretation of the record to suggest that this issue was properly presented to the Commission, Duke does not – because it cannot – point to any portion of the record where it analyzed what the effect of such "spillover would be" and identifies no analysis or information in the record that would support this baseless claim.[3] Nevertheless, the point behind Witness Horii's testimony was that due to the "tremendous amount of free 'advertising'... Solar PV is clearly in another league from little known, untrusted, and obscure EE alternatives with 10% free rider values." Tr. p. 462.22, ll. 1-8. In this regard Witness Horii opined the Companies should consider the prevalence of Solar PV in their service territories which, according to Duke, would be more than 2% of DEC and DEP homeowners by 2021. This, combined with the other substantive analyses reflected in Witness Horii's testimony, provide more than substantial evidence for the Commission to affirm its finding that "[t]he evidence presented by ORS Witness Horii, using information provided by Duke, reasonably supports a finding that Duke's proposed program passes neither the UCT nor the TRC tests." Order p. 36.

Next, the Companies claim Witness Horii's analyses are flawed based upon an assertion that he ignored the 25-year Winter BYOT requirement when estimating free-ridership. Again,

[3] For the first time in its Petition, Duke also references certain definitions of "free-ridership" and a new definition of energy efficiency that are not part of the record in this proceeding and should be stricken from consideration by this Commission. *See* Duke Pet. p,3, fns. 2-4; p. 5, fn.6. Even still, there is nothing in these new definitions that would support Duke's claims the Commission erred in considering ORS Witness Horii's testimony regarding free-ridership. Nor does the revised EIA definition change anything regarding whether the Programs are properly categorized as "energy efficiency."

however, the record is not in Duke's favor. Witness Horii specifically addressed the impact of the Winter BYOT, noting he was "aware that [Duke] has not really exercised the Winter BYOT program yet, and so it's unclear how many times the program would be operated, and so it's not clear … how much of a … burden a BYOT program might be on customers." Tr. p. 488, ll. 17-22. *See also* Tr. p. 489, ll. 5-20 (noting that he did not see a synergy between the programs or reason to bundle them because "[n]othing about solar PV is going to help the Winter BYOT program."), ll. 16-20 (stating that there is no reason to bundle the programs together "other than trying to … make this program seem more palatable to the regulators."); Tr. 543, ll.7-22 ("It's like we're just adding something onto a program, just so we can sort of legally push it through"). In addition, Witness Horii again noted the Companies' information on this issue was deficient to make such an analysis because they "have neither quantified how much those increased benefits [from BYOT] might be, nor demonstrated that the proposed Programs are a cost-effective way to obtain any increased benefits." Tr. p. 463.24-.25.

Similarly, Duke criticizes ORS Witness Horii for using customers on Schedule RS in his free-ridership calculation when those customers cannot participate in the Programs. Duke Pet. p. 15. However, there is substantial evidence in the record to support the Commission's approval on Witness Horii's conclusion in this regard. For one, Witness Horii carefully explained that the reason he used forecasted solar installations for customers on Schedule RS was not arbitrary, but because the behavior of all-electric Schedule RE customers could be influenced by the potential for the $3,500 incentive under the Program and because Duke was not able to separate its solar adoption forecasts between all-electric and other residential customers. Tr. p. 521-522. *See also* Tr. p. 459.24, l. 7 - p. 459.26, l. 2. Witness Horii further confirmed that the fundamental economics for RS versus RE customers was essentially the same by examining hourly usage data of these

classes, which virtually were the same by time of use (TOU) period. Accordingly, Witness Horii determined the expected bill savings from PV, and therefore Program adoption rates, basically should be the same. Tr. p. 463.20. The record also reflects Duke did not substantively and persuasively respond to Witness Horii's assertion that the economics of Solar PV were fundamentally the same between rate Schedule RE and RS customers. *See* Tr. p. 463.20, ll. 7-22. Instead, the Companies offered only analytical criticisms regarding factors that may not have been picked up in Witness Horii's analysis. However, Witness Horii explained that these factors either did not actually affect his analysis or were unsupported by any actual data while at the same time cutting both ways from an analytical perspective in the cost-effectiveness analysis.

Finally, Duke resorts to manufacturing unsubstantiated fears of the impending calamities that supposedly will result from the Commission's Order. The Companies claim that denying the Programs will result in a threshold standard requiring electric utilities to propose EE/DSM programs only if they have been adopted by less than 2% of customers. Duke Pet. p. 16. They further suggest the Commission would have "to take several leaps in logic" to ignore:

1. The Companies' real-world experience with free-ridership, which averages 18%;[4]
2. The accepted distinction between spillover and free-ridership;[5]
3. The realities of the Programs' eligibility requirements (i.e., 25-year commitment to Winter BYOT);[6]

[4] Even though Duke claims free-ridership for the Programs is 0% and their assumption of 10% is conservative.

[5] Which distinction Duke failed to articulate during the proceedings and attempts to raise as a new issue through its Petition.

[6] Which Witness Horii specifically addressed by stating, in part, the Companies "have neither quantified how much those increased benefits [from BYOT] might be, nor demonstrated that the proposed Programs are a cost-effective way to obtain any increased benefits." Tr. p. 463.24-.25.

4. The *de minimus* adoption rates of solar alone on the Companies' systems;[7]

5. Witness Horii's false equivalency utilized in his adoption forecasts;[8] and

6. The express language of the Commission-approved EE/DSM Mechanism.[9]

Duke Pet. pp. 17-18. While this "Chicken Little" approach appears to have been intended to instill fear in the hearts of regulators, it simply is not true and should not form the basis for any decision by the Commission to reconsider its decision. The truth is that, if the Companies wish to propose an EE/DSM program, they only have to present evidence to support their proposals sufficient to overcome their evidentiary burden. Here, Duke simply failed to satisfy its burden and its failure to do so does not warrant the Commission reversing course and approving speculative, unproven, and costly programs, the cost and expenses of which Duke seeks to have its customers bear for the benefit of its shareholders.

2. The quantifiable benefits of the Programs.

Moving off of free-ridership, Duke further takes issue with the Commission's agreement with Witness Horii that "the Companies have neither quantified how much those increased benefits might be, nor demonstrated that the proposed Programs are a cost-effective way to obtain any increased benefits." Order p. 35 *quoting* Tr. p. 463.25, ll. 2-4. In support of this claim, Duke proceeds to cite to various portions of the record that make nebulous claims of "net savings" and "benefits," all of which are unsupported by the record. *See* Tr. pp. 463.24-.25. Even so, the

[7] Which is based upon a year in which a pandemic rocked the nation and which is contradicted by the Companies' own data. *See* Tr. p. 463.21 at fn.3.

[8] Which Witness Horii fully addressed and justified, in part due to Duke's inability or unwillingness to provide sufficient data to support alternative analyses. Tr. p. 521-522. *See also* Tr. p. 459.24,

[9] Which, as the Commission correctly noted, does not *require* approval of any EE/DSM program proposed by an electrical utility but is within the Commission's sole discretion to approve if it deems it cost-effective, which these Programs are not. Order p. 37.

Companies appear to miss the clear intent of Order No. 2022-239. All of the Companies' estimates and assumptions underlying the programs are uncertain, unsubstantiated, and dubious as fully detailed by ORS Witnesses Horii, Lawyer, and Morgan. In turn, it cannot be discerned with reasonable certainty what impact these Programs will have on Duke's system, other than to increase the costs borne by its customers. Because Duke failed to substantiate the professed benefits of the Programs with reasonable certainty, the Commission was fully justified in weighing the evidence presented and concluding that the Companies failed to satisfy their evidentiary burden. *See Ross*, 298 S.C. at 492, 381 S.E.2d at 730 ("The final determination of witness credibility and the weight to be accorded evidence is reserved to … Commission.").

3. EM&V Process.

Duke next doubles down on its argument that the Companies could address any inaccuracies with the free-rider percentage input after the Programs are implemented as part of the EM&V process. Duke Pet. p. 19. *See also* Order p. 36. However, the law and Commission precedent are clear that where testing shows that a proposed program is clearly not expected to be cost-effective, such a program cannot be approved. S.C. Code Ann. § 58-37-20 ("Commission may adopt procedures that encourage electrical utilities ... to invest in *cost-effective* energy efficient technologies and energy conservation programs.") (emphasis supplied). Deferring cost-effectiveness review to the EM&V stage effectively absolves the utility of carrying its burden to show that a proposed program is expected to be cost-effective. Further, such a deferral would not be an effective or efficient use of resources for a program that is not reasonably expected to be cost-effective. *See, e.g.*, Tr. pp. 499–500. And the incentive of the utility at the EM&V stage – to demonstrate cost-effectiveness or forgo net lost revenues and program performance incentives – could reasonably be expected to compound the administrative complexity and the regulatory

resource investment required to conduct and review EM&V for a program such as the ones at issue in this proceeding. *See also* Tr. p. 499, l. 23 – p. 500, l. 14 (noting that fixing any problems at the EM&V stage would be bad policy, that Duke failed to present an EM&V plan or survey that will provide reliable results, and that EM&V studies can take up to three years).

4. Solar PV as an EE Measure.

In the event the Commission grants Duke's Petition with respect to whether the Programs are cost effective, the Companies further request the Commission address whether they qualify as an EE measure under S.C. Code Ann. § 58-37-20 and whether Duke can recover the resulting lost revenues. Because these issues have been fully briefed and explained by the parties through pleadings and testimony and for the sake of administrative economy, ORS will not fully detail its positions again herein. Rather, ORS incorporates herein by reference its prior arguments[10] that:

1. The Programs are subject to the requirements of both S.C. Code Ann. §§ 58-37-20 and 58-40-20;

2. The final sentence in S.C. Code Ann. § 58-40-20(I) does not apply exclusively to lost revenues associated with Commission Order No. 2015-194;

3. Duke should not be permitted to recover lost revenues incurred as a result of the Programs;

[10] In addition to the issues raised in direct and surrebuttal testimony, on cross- and recross-examination, and as otherwise reflected in the transcripts of these proceedings, ORS specifically incorporates herein by reference the positions advanced in its:

1. Motion for Summary Judgment Regarding the Companies' Programs, dated September 27, 2021;

2. Motion Requesting Oral Argument, dated September 27, 2012;

3. Reply to Responses to Motion for Summary Judgment Regarding the Companies' Programs and Renewed Request for Oral Argument, dated October 14, 2021; and

4. Response in Opposition to Motion to Limit ORS's Testimony, dated October 18, 2021; and

5. Proposed Order, dated December 3, 2021; and

6. Such other filings reflecting ORS's position on these matters.

4. Lost revenue is lost revenue, whether it is derived from "NEM total generator output" or "reduced grid energy usage due to self-consumption;"

5. It is unlawful to pass lost revenues from these Programs onto the Companies' customers;

6. The Programs do not qualify as EE;[11]

7. Duke failed to show clear and meaningful synergies from the proposed pairing of Solar PV and the Winter BYOT program that would support a fundamental shift in our understanding of EE;

8. The Companies' free-ridership estimates are undervalued and ORS's free-ridership estimates more accurately reflect the reality of these Programs' expected free-ridership;

9. Duke failed to carry its burden of proving by a preponderance of the evidence that the Programs will be cost-effective;

10. It would be inappropriate to allow these Programs' costs to be passed onto the Companies' customers without the sufficient showing that the Programs are expected to be cost-effective.

B. SEIA Petition

1. Solar PV as an EE Measure.

Similar to Duke, SEIA also claims that the Commission's Order "will have a chilling effect on the ability of utilities and industry to collaboratively invest time and resources into Section 58-37-20 [EE] programs." And, like Duke, SEIA can point to nothing in the record that would support this purported cataclysmic result and, therefore, there is no basis for this argument. Because the Commission concluded that Duke failed to satisfy their burden of proof with respect to the cost-effectiveness of the Programs, it was unnecessary to reach a decision on whether S.C. Code Ann.

[11] While ORS asserts that Duke has improperly attempted to inject new evidence into the record of this proceeding which is not appropriate for consideration in a petition for reconsideration or rehearing, to the extent the Commission is inclined to consider those points, ORS notes that the North Carolina Public Staff also recently opined that similar programs proposed by Duke in North Carolina also are not considered energy efficiency. *See* https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=1b69225b-fcb2-4169-8edc-3a6b5a72775c

§ 58-37-20 applies. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598. Thus, it is appropriate for the Commission to deny SEIA's request for clarification on this issue.[12]

2. Disruption of the Solar Market.

Next, SEIA turns its attention to the Solar Choice Metering rate design, stating that its support of "modifications to net metering has always been contingent on the availability of the Smart $aver Solar incentive" and that "the rate design is insufficient to support sustained growth of the rooftop solar industry." SEIA Pet. p. 6. In this regard, SEIA suggests that the Commission should reverse its decision because "the fate of the rooftop solar industry" is inextricably tied to the Companies' Programs. *Id.* Again, there is nothing in the record that would suggest the Commission's disapproval of the Programs would lead to such a result. Even so, in making this request, SEIA essentially is saying the Commission should disregard the fact that the Programs are not cost effective and that customers should bear additional and unnecessary costs simply to prop up privately owned solar companies. Surely, this is not what the General Assembly intended when passing the South Carolina Energy Freedom Act, and it strains credulity to suggest otherwise.

3. Solar Choice Docket.

Finally, SEIA asks, if the Commission denies Duke's Petition, to reopen the Solar Choice Metering dockets to investigate whether additional measures are needed to mitigate the transition to Solar Choice Metering. In support of this request, SEIA states without support that "prospective customer generators are exposed to the negative changes to the value proposition without the positive attributes of Smart $aver Solar." SEIA Pet. p. 7. Again, the record is devoid of any

[12] To the extent, however, the Commission is inclined to grant this request, ORS would incorporate herein by reference the positions previously advanced in pleadings and testimony as reflected in the record of this proceeding. *See* Argument, Sec. A.4, *supra*.

evidence that would support this contention. Nevertheless, it would be inappropriate for the Commission to grant the relief requested by SEIA in this docket without noticing all the parties of record to that proceeding and giving them an opportunity to opine on whether such relief is necessary and warranted. Accordingly, the Commission should deny SEIA's request.

CONCLUSION

For the foregoing reasons, the Commission should deny the Duke Petition, the SEIA Petition, and grant such other and further relief as may be appropriate.

Respectfully submitted,

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